No. 99-1079

In The

Supreme Court of the United States

URVASHI B. PATEL, an individual,

Petitioner,

v.

OMH MEDICAL CENTER, INC., an Oklahoma corporation, ST. FRANCIS HOSPITAL, INC., an Oklahoma corporation and JOHN B. STEVENS, an individual,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court should review a claim that the Oklahoma Supreme Court violated federal due process in requiring a party to prove four factors in an evidentiary hearing in order to obtain vacation of a state court judgment on the basis of fraud despite the fact that the Oklahoma Supreme Court remanded the case for an evidentiary hearing on those factors, thus precluding its ruling from being construed as a final judgment?

2. Whether the Oklahoma Supreme Court violated federal due process by remanding the trial court's order vacating a prior judgment against Petitioner for an evidentiary hearing where the Oklahoma Supreme Court found that there were factual issues regarding Petitioner's fraud allegation which required evidentiary hearing by the trial court?

3. Whether the Oklahoma Supreme Court violated federal due process by ruling that under the Oklahoma statute governing vacation of judgments for fraud, 12 Okla. Stat. § 1031(4) (1991), a movant must establish four factors – (1) he or she acted without delay in asserting his or her rights after discovering the fraud, (2) he or she used diligence in the original action in trying to discover and expose the fraud, (3) clear and convincing evidence of the fraud and (4) a substantial likelihood that a new trial will have a different result – and by remanding the case for an evidentiary hearing on those factors?

PARTIES TO THE PROCEEDINGS

OMH Medical Center, Inc., Saint Francis Hospital, Inc., and John B. Stevens were defendants and appellants in the courts below. OMH Medical Center, Inc. is an Oklahoma not for profit corporation. Saint Francis Hospital, Inc., is an Oklahoma not for profit corporation.

Urvashi B. Patel was the plaintiff and appellee in the courts below.

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STATEMENT OF JURISDICTION

As more fully discussed below, the Court lacks jurisdiction over this case because the Oklahoma Supreme Court decision has remanded this case for an evidentiary hearing and is not a final judgment.

STATEMENT OF THE CASE[1]

One month after accepting the benefits of a favorable jury verdict on her state law breach of contract claim (in *Patel I*), Petitioner Urvashi B. Patel ("Patel"), filed a petition (*Patel II*) to vacate the verdict rendered against her on her tort claims. Patel alleged that Respondents' counsel committed "fraud" during the trial with respect to an exhibit Respondents sought to introduce. Having only heard oral argument on Patel's Motion for Summary Judgment (but without specifically ruling on that motion), the trial court vacated the judgment in *Patel I*

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[1] Respondents are aware of their obligation pursuant to Sup. Ct. R. 15.2 to address any misstatements of fact or law contained in Patel's Petition. However, Respondents respectfully submit that the Petition is so replete with misstatements, overstatements and exaggerations of fact and law that a complete recitation of those misrepresentations would cause Respondents to run afoul of this Court's requirement of brevity. Therefore, Respondents have included their own Statement of the Case, which implicitly refutes the misstatements in Patel's own such attempt. Further, the most egregious and important of Patel's misstatements are specifically addressed herein. An example of one of Patel's more blatant misrepresentations is her repeated allegation that the Oklahoma Supreme Court "did not even purport to disturb the trial court's 'finding' of fraud." Pet. 9-10. As discussed herein, the decision of the supreme court clearly "disturbs" such finding by holding that the trial court abused its discretion in making such a finding without first conducting an evidentiary hearing. *See, e.g.*, Pet. App. 35a-36a. An additional example of an egregious misstatement is Patel's claim that the trial court determined that the alleged fraud was committed knowingly. *See, e.g.*, Pet. 3, 8, 18, 20. In fact, the trial court made no finding that Respondents made any knowing or intentional misstatement. Pet. App. 44a. Respondents similarly deny that they admitted facts comprising extortion at trial in *Patel I*. *see* Pet. 5, and that Mr. Henry "lied" to the court as alleged throughout Patel's Petition.

without benefit of an evidentiary hearing. Respondents appealed to the Oklahoma Supreme Court, which concluded that factual issues regarding the fraud existed and remanded the case for an evidentiary hearing on the fraud issues and on other factors articulated by the court on appeal.

Patel asserts that the Oklahoma Supreme Court's decision to remand the case for an evidentiary hearing on the petition to vacate violated her procedural due process rights. To the contrary, Patel's rights have not been impacted, as she will have an opportunity on remand to present evidence on unresolved, disputed facts related to her fraud allegations. The true effect of the Oklahoma Supreme Court's decision is the preservation of *Respondents'* due process rights, which were violated when the trial court vacated the judgment without first conducting an evidentiary hearing.

Nothing in this case warrants review by the Court. No federal statutes are implicated. No broad policy questions are at issue. Apart from a baseless due process claim, no constitutional questions are presented. What this Petition actually represents is one final attempt by Patel -- after six years of litigation -- to relitigate the tort claims that were unequivocally rejected by the jury.

This case arises in the context of three separate state court lawsuits: *Patel I, Patel II* (this case), and *Patel III* (which is the subject of a separate Petition for Writ of Certiorari in this Court, Case No. 99-1101, in which Patel asserts that the decision violated her right to equal protection of the laws.)

A. *PATEL I*

Petitioner Urvashi B. Patel, is a physician who was employed as an anesthesiologist by Respondent OMH Medical Center, Inc. ("OMH"). In October 1993, after months of discussions between OMH and Patel, OMH terminated Patel's

employment contract by invoking the termination clause contained therein. OMH paid Patel the $50,000 termination fee, off-set by the amount of the unearned portion of the medical malpractice insurance premium OMH had prepaid as part of Patel's compensation. In November 1993, Patel sued OMH, Saint Francis Hospital, Inc., and John B. Stevens, the administrator at OMH at the time the cause of action in *Patel I* arose, alleging breach of contract and the torts of emotional distress, conversion and prima facie tort.[2] R. 36 at 2. Patel alleged that Respondents attempted to "blackmail" her by threatening to withhold letters of recommendation unless she waived her rights to the contract termination fee. After a three-day jury trial, the jury returned a verdict awarding Patel $12,464.18 against OMH on her breach of contract claim, which represented the amount OMH offset against the termination fee for the prepaid malpractice insurance premiums. *Id.* at 542. The jury found in favor of Respondents on the remaining tort claims. *Id.* Both parties appealed the verdict to the Oklahoma Court of Appeals, which affirmed the trial court. R. 38. The Oklahoma Supreme Court denied review, and the judgment became final in July 1996. R. 37.

B. *PATEL II*: THE INSTANT CASE

1. *Petition to Vacate*

In August 1996, Patel accepted from OMH the amount due upon the judgment in full payment and satisfaction thereof. R. 53. Less than one month later, however, Patel filed a Petition to Vacate the adverse jury verdict on her tort claims pursuant to 12 Okla. Stat. § 1031(4) (1991). Resp. App. 1a; R. 87. Although Patel contends that she alleged "various" material

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[2] Patel withdrew the claim for conversion at the pre-trial conference.

fraudulent representations in her Petition to Vacate, Pet. 6, Patel actually alleged only one fraud, namely that Respondents and their counsel, Larry D. Henry, made false representations to the court during the trial with respect to an exhibit ("Exhibit 1") which Respondents sought to introduce, and that the court relied upon the misrepresentations in admitting the exhibit. *See* Resp. App. 10a. Patel further alleged that the admission of Exhibit 1 tainted the jury verdict because its negative contents prejudiced the jury against Patel and because it falsely rebutted one of Patel's principal contentions at trial.[3]

2. *Trial Proceedings and Exhibit 1*

In *Patel I*, Patel alleged that, upon her termination from the hospital, OMH refused to provide her with anything but a neutral reference, which stated only her position and dates of employment at OMH. R. 36 at 2; R. 36, Tr. 545. Patel's damages witness at trial testified that it would be all but impossible for Patel to find a good job with such a reference. R. 36, Tr. 217-18. Respondents then offered Exhibit 1 to rebut that testimony on the issue of damages, not to prove the truth of the matters contained therein. R. 36, Tr. 610-11.

Exhibit 1 is a copy of a recommendation from Patel's previous employer, Scotland Memorial Hospital in North Carolina. R. 36 at 654. The reference was issued in response to OMH's hiring-process inquiries about Patel's performance at Scotland Memorial, and is one of several personal and professional references in Patel's OMH credentialing file. R. 36, Tr. 610; R. 231-40. Scotland Memorial's reference states

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[3] Patel also filed an Amended Petition to Vacate, alleging additional grounds for vacation. The trial court did not rule on the Amended Petition, finding that it had been rendered moot by its order vacating the judgment. Pet. App. 47a.

that Patel's performance had been average to below average and recommended that she be monitored before being granted full medical privileges at OMH. R. 237.

Patel objected to Exhibit 1. During a bench conference between the court and counsel for the parties, Patel's counsel stated that Patel believed Exhibit 1 was not a complete document -- that there was another document in her credentialing file, stapled or glued to Exhibit 1. R. 36, Tr. 613. Neither Patel nor her counsel had actually seen any such document.[4] Upon questioning by the court, Mr. Henry stated that Exhibit 1 was a complete document and that there was nothing attached to it. *Id.* 613-14. The court stated that if there was "something in the file that references this document [Exhibit 1] that explains it or further modifies it in some respect," Patel's counsel would be entitled to have it produced. *Id.* 615. Mr. Henry responded that there was nothing of that nature in the file, but that there were contradictory references from others in the same city included in the file. *Id.* Respondents stipulated to the jury that the remainder of Patel's file was positive. *Id.* 612, 707.

The court was therefore confronted with differing statements or opinions of counsel, and the original of the file at issue was at OMH in Okmulgee, Oklahoma (approximately 40 miles from the trial court) and hence not available for immediate review. R. 36, Tr. 614-17. To resolve the issue, the court ruled that the "fairest thing to do is have Dr. Patel testify about this. . . . She is going to have to testify about that. There is something else in the file." *Id.* 617. Patel's counsel did not object further. Nor did Patel request a continuance until the file could be brought into court and reviewed for the allegedly

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[4] Although Patel engaged in pretrial discovery, she never requested a copy of her medical credentialing file.

refuting document. Instead, counsel agreed to allow Patel to testify about the file, stating, "OK. That is fine." *Id.* Exhibit 1 was admitted into evidence.

In her rebuttal testimony, Patel testified that she was informed by the risk manager of OMH, Karen Legg, of the existence of the negative reference (*i.e.,* Exhibit 1) in 1992, *id.,* and that she then contacted another physician at Scotland Memorial, who in turn contacted Ms. Legg to comment on and to explain the negative reference, *id.* 696-99. Patel also was allowed during her testimony to rebut the criticisms contained in the reference, as well as the testimony of others given during the trial. *Id.* 697-706. Respondents did not rebut Patel's testimony in this regard.

3. *Patel II Discovery*

After Patel filed her Petition to Vacate, she deposed Ms. Legg, who brought with her a copy of Patel's credentialing file for Patel to review. Ms. Legg testified that Patel's testimony at trial was incorrect, as she did not recall having any discussions with Patel about her credentialing file or the references it contained. R. 213, 218-19. Ms. Legg did recall being contacted by another physician from North Carolina who expressed his personal opinion as to why Scotland Memorial provided the unfavorable reference. R. 211, 214-15. Ms. Legg reduced this conversation to a written telephone message and added it to the other references in Patel's file. R. 71, 208-09. However, contrary to Patel's assertion that Exhibit 1 was a "mere fragment" of a "*larger* document", Pet. 17, Ms. Legg's testimony was that the message was not attached, stapled, or glued to Exhibit 1. R. 204-07. Ms. Legg never determined that the information contained in the reference from Scotland Memorial was false, R. 215, and nothing in Patel's file from Scotland Memorial referenced, retracted, modified or altered in

any way its negative recommendation regarding Patel, R. 352-53.

After Ms. Legg's deposition, Mr. Henry filed two affidavits in the trial court, explaining his response to the court during the bench conference at trial and his knowledge of the allegedly "refuting" document , *i.e.,* Ms. Legg's typewritten notes regarding her telephone discussion with the physician. R. 350; R. 419. According to Mr. Henry's affidavit, when Patel objected at trial to Exhibit 1, Mr. Henry related to the court the contents of Patel's file – which he had not seen for several months – as "honestly and candidly" as he could recall. R. 352. He correctly recalled that there was nothing attached to the exhibit, as Patel and her counsel contended. *Id.* He also correctly recalled that there was at least one reference that contained comments which contradicted the reference of Scotland Memorial, and he informed the court of such. *Id.* He stated in his affidavit that, when asked by the court if there was a document which referenced Exhibit 1, he interpreted the question to mean whether Scotland Memorial had later amended, altered, or in any way changed its recommendation. R. 352-53. He correctly recalled that it had not. R. 353.

Patel contends that the existence of the telephone memorandum in her medical credentialing file provided proof of Respondents' fraud, as well as proof that Respondents and their counsel committed serious discovery fraud prior to trial. Patel further alleges that the entire case Respondents presented to the jury was one of fraud. Pet. 6. However, Patel never sought to review her credentialing file during discovery, so her allegations of discovery fraud are wholly unfounded. Furthermore, Mr. Henry's affidavits refute Patel's allegations that he made knowing and fraudulent misrepresentations to the trial court and indicate the existence of disputed facts that remain to be proven on remand. Finally, Patel's allegations that

the entire case was based upon "fraud, falsified and despoiled documents[5] and perjury", Pet. 6, are simply false. Both parties presented numerous witnesses during the three-day trial in *Patel I*, all of whom testified to facts wholly unrelated to Exhibit 1.

4. *The Trial Court's Vacation Order in Patel II*

Respondents filed a motion to dismiss Patel's Petition to Vacate, which the trial court denied without oral argument, and Patel filed a motion for summary judgment. At the conclusion of oral argument on the motion for summary judgment, the district judge stated that she was not prepared to rule on the motion at that time, but would review the parties' submissions and make a decision at a later date. A specific ruling on the motion for summary judgment was never entered.

On November 14, 1997, without having first conducted an evidentiary hearing, the trial court issued a ruling entitled "Order on Plaintiff's Petition to Vacate in Part." Pet. App. 44a. The court did not specifically state whether the order was responsive to Patel's motion for summary judgment. However, it did state that the court had "reviewed and considered the parties' submissions on Plaintiff's Petition to Vacate Judgment in Part, including their briefs, affidavits, exhibits, oral arguments, and case authority." Pet. App. 44a. The court found that Henry's "misrepresentation to the Court and opposing counsel constituted grounds under 12 Okla. Stat. § 1031(4) to vacate the judgment on Plaintiff's tort claims entered on the jury verdict." Pet. App. 47a. Contrary to Patel's assertions in her Petition, the trial court *did not find* that "Respondents, through

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[5] In *Patel III*, which is discussed below, the Oklahoma Supreme Court specifically found that Respondents' conduct in *Patel I* did not present a case of spoliation of evidence.

their lawyer, Larry D. Henry, made materially false representations . . . with full knowledge of the actual facts and the material effect their misrepresentations would have". Pet. 8; *see* Pet. App. 44a. Nor did the court find that admitting Exhibit 1 "resulted in the jury being materially misled," as Patel also claims in her Petition. Pet. 9; *see* Pet. App. 44a.

Respondents appealed the trial court's order to the Oklahoma Supreme Court, which reversed the trial court's order, as described below.

C. *PATEL III*

In February 1997, while *Patel II* was pending in the trial court, Patel filed a third action against the corporate defendants in *Patel I* and *Patel II*, as well as Mr. Henry and his law firm, Arrington Kihle Gaberino & Dunn ("AKG&D"). Patel sought compensatory and punitive damages for acts of fraud, deceit, and spoliation of evidence allegedly occurring during the *Patel I* trial. Respondents filed a motion to dismiss pursuant to 12 Okla. Stat. § 2012(B)(6) (1991), on the grounds that the petition failed to state a claim upon which relief could be granted. The trial court granted the motion and dismissed the case. Patel appealed to the Oklahoma Supreme Court, which affirmed the trial court. As noted above, that decision is the subject of separate Petition for Writ of Certiorari in this Court.

D. THE OKLAHOMA SUPREME COURT'S REVERSAL OF THE TRIAL COURT'S VACATION ORDER

Although the Oklahoma Supreme Court did not formally consolidate the appeals from *Patel II* and *Patel III*, it considered the two appeals together and issued a single opinion disposing of both appeals on April 27, 1999. The court affirmed the trial court's dismissal of Patel's petition in *Patel III* (against

Respondents, Mr. Henry, and AKG&D) and reversed and remanded the trial court's decision in this case, *Patel II*. Patel filed Petitions for Rehearing of both cases in the Oklahoma Supreme Court, raising her due process argument in this case for the first time. The court denied both petitions summarily.

The Oklahoma Supreme Court held that it was an abuse of discretion for the trial court to grant the Petition to Vacate on the grounds of fraud without first evaluating the petition in light of the principle of finality of judgments, which requires the adoption of "reasonable and prudent procedural requirements on a litigant who launches a §1031 attack." Pet. App. 32a.

> We accordingly hold that in a proceeding under §1031 to vacate an earlier judgment on the grounds of fraud, *the petitioner must*: (1) show that he (or she) acted without delay in asserting his (or her) rights after discovering the fraud, (2) establish that he (or she) used diligence in the original action in trying to discover and expose the fraud, (3) provide clear and convincing evidence of the fraud, and (4) demonstrate that there is a substantial likelihood that a new trial will have a different result. The prudential requirements we impose today on one who initiates a §1031 attack will ensure that the complaining party has not in some way helped to create, or invited, the need for a new trial and that granting new trial will not be a useless exercise.

Id. 32a-33a. The court concluded that the "absence from the record of any judicial inquiry into these prudential factors requires that the postjudgment order of vacation be reversed and the cause remanded for further proceedings." *Id.* 33a.

Contrary to the assertion in Patel's Petition that the Oklahoma Supreme Court "did not even purport to disturb" the trial court's "finding" of fraud, Pet. 9-10, the supreme court also

noted that disputed issues of fact exist regarding the fraud issue and that the trial court therefore abused its discretion[6] by failing to conduct an evidentiary hearing prior to vacating the judgment on the basis of fraud.[7] The court held that due process requires that all parties be afforded the opportunity to present evidence on disputed facts before a judgment may be vacated on such a basis. "The Constitution inexorably commands that no one's rights are to be adversely affected by judicial process that takes place in the absence of notice and a full and fair opportunity to be heard." Pet. App. 35a. Accordingly, the court remanded the case in order to afford Patel and Respondents an opportunity to

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[6] Without citation to the opinion, Patel contends that the Oklahoma Supreme Court "ruled" that consequences of attorney fraud vary significantly depending upon whether the fraud is discovered before or after a judgment becomes final. Pet. 4. However, the alleged "ruling" was actually made in the context of determining the appropriate standard of review to apply on appeal. The Oklahoma Supreme Court held that summary judgment cannot be used to decide post-judgment vacation quests. According to the court, summary process is governed by Oklahoma District Court Rule 13, which by its terms applies only to prejudgment issues. Pet. App. 13a. In contrast, a vacation proceeding under 12 Okla. Stat. § 1031, upon which Patel relied, is a "legislatively created remedial mechanism in which the litigant seeks not a judgment, but rather relief from a judgment." Pet. App. 13a. Having concluded that summary judgment is not available in a vacation proceeding, the supreme court held that Patel's Motion for Summary Judgment must be treated as a motion to enter the matter for hearing. Thus, the court concluded that the trial court's order granting Patel's Petition to Vacate "must be viewed as responding directly to Patel's quest for vacation." Pet. App. 16a. The court then held that the appropriate standard of review of an order granting or denying a petition to vacate is whether the trial court abused its discretion, not the de novo standard applied in appeals from summary judgments. *Id.*

[7] Patel claims that Respondents failed to prove the immateriality of the alleged misrepresentation. Pet. 10. However, this statement ignores the fact that the trial court failed to hold an evidentiary hearing and, thus, Respondents did not have an opportunity to offer any proof on that issue. Moreover, the Oklahoma Supreme Court squarely placed the burden of proof on Patel to prove the materiality of the alleged misrepresentation. Pet. App. 32a.

present evidence on the fact issues relating to fraud, as well as fact issues relating to the factors set forth in the opinion. Pet. App. 35a.

REASONS FOR DENYING THE PETITION

In an effort to create an issue worthy of review, Patel mischaracterizes this case and the surrounding law. First, the Oklahoma Supreme Court did not "decide a substantial federal question in a way clearly in conflict with applicable decisions of this Court", Pet. 25, thereby violating her procedural due process rights. Patel seeks to transform garden variety state issues into federal issues by tossing together two completely separate lines of precedent: (1) cases recognizing a federal court's authority to vacate its prior judgments where those judgments were fraudulently obtained and (2) cases setting aside civil default judgments or criminal convictions where a constitutional violation has been proven. By mixing these two unrelated lines of cases and adding liberal dashes of misstatements of fact and misrepresentations of law, Patel attempts to convince the Court that she has a due process right to vacation of the judgment in *Patel I.* Although Patel's recipe for creating federal constitutional issues where none exist may win her points for creativity, the finished product has the taste and smell only of a purely state issue and falls far short of establishing even an arguable basis for the Court to exercise discretionary review in this case.

The case upon which Patel relies almost exclusively in support of her due process claim, *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), is inapposite. In *Hazel-Atlas*, the Court noted the long-standing reluctance to set aside judgments, except where enforcement of the judgment is "manifestly unconscionable." *Id.* at 244-45. In setting aside the judgment (which involved fraud committed by a number of

parties on the patent office as well as on the court), the Court stated it was "not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury." *Id.* at 245. Rather, it was "a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals" and hence affected not just private parties but also involved "issues of great moment to the public." *Id.* There is absolutely no similarity between that case and the instant case.

Nor, as Patel claims, does the Oklahoma Supreme Court's decision corrode the administration of justice in Oklahoma. Pet. 26. The Oklahoma Supreme Court expressly notes in *Patel III* that a myriad of other sanctions against and remedies for fraud are available even absent the creation of a new tort. Pet. App. 40a. The court thus makes clear that its decision does not create an open-season for litigation-related fraud or other misconduct.

Finally, the decision of the Oklahoma Supreme Court ultimately produced a just result because it was necessary to protect Respondents' due process rights. In the instant case, the district court vacated the judgment in *Patel I* without holding an evidentiary hearing or allowing Respondents to offer evidence on disputed fact issues, including the crucial issue of whether a fraud occurred. The Oklahoma Supreme Court concluded that the district court's failure to entertain evidence prior to vacation violated Respondents' due process rights. Pet. App. 35a. Therefore, the court's decision to remand this case actually remedied a due process violation and also afforded Patel an equal opportunity to adduce proof of the alleged fraud and other evidence required by the supreme court's ruling.

I. THE DECISION OF THE OKLAHOMA SUPREME COURT IS NOT A FINAL JUDGMENT.

This Court has recognized that in order to be reviewable by this Court, "a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.'" *Jefferson v. City of Tarrant*, 118 S. Ct. 481, 485-86 (1997) (*quoting Market St. R. Co. v. Railroad Comm'n of California*, 324 U.S. 548, 551 (1945)). This Court's jurisdiction "founders on the rule that a state-court decision is not final unless and until it has effectively determined the entire litigation." *Id.* at 487. Patel's Petition clearly seeks review of a nonfinal decision.[8]

In the instant case, the Oklahoma Supreme Court reversed the trial court's decision vacating the *Patel I* judgment

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[8] Patel summarily asserts that because the judgment would have been final if the Oklahoma Supreme Court had affirmed the trial court, this judgment, too, should be final. Pet. 1-2 n.1. She also claims that the judgment would be final if this Court granted certiorari and reversed. *Id.* However, the finality of a judgment cannot be determined by looking at hypothetical situations. It must be based on the current state of affairs. Further, Patel attempts to argue that this case falls within one of the limited exceptions to the finality rule, arguing that the federal issue is conclusive, that there would be no federal questions before the trial court on remand and that delaying certiorari review of the alleged federal question until after trial will "leave unanswered . . . an important [federal] question." Pet. 1-2, n.1 (internal quotation marks omitted) (alteration in original). As discussed herein, these exceptions are simply inapplicable to this case because the alleged federal issue (*i.e.*, the adoption of the four-factor test) may either not be conclusive on remand or may be applied in Patel's favor. Moreover, even if a federal issue exists in this case – which Respondents vehemently deny – it is certainly not the type of "important federal issue" that requires expedited consideration by this Court.

on the grounds that the trial court abused its discretion by failing to hold an evidentiary hearing on the disputed factual issue of whether Respondents committed fraud. Patel does not appear to wage a constitutional attack on this facet of the supreme court's ruling. Indeed, she attempts to ignore this aspect of the decision altogether. *See* Pet. 10. Instead, she focuses on the four-factor test adopted by the supreme court for application in vacation proceedings. When the Oklahoma Supreme Court remanded the case to the trial court, it directed that court to hold an evidentiary hearing on the fraud issues and the other factors articulated in its opinion. Thus, it is entirely possible that once the trial court properly conducts an evidentiary hearing, the court will determine that Patel cannot establish that any fraud occurred. Accordingly, the trial court may not even be required to apply the other three factors articulated in the supreme court decision and challenged on constitutional grounds by Patel.

Further, even if Patel prevails on the fraud issue but fails to establish one or more of the other factors required by the Oklahoma Supreme Court, she will be free to appeal that judgment to the Oklahoma Supreme Court and, if necessary, to petition this Court again for certiorari review. *See Jefferson*, 118 S.Ct. at 486 ("Even if the Alabama Supreme Court adheres to its interlocutory ruling as 'law of the case', that determination will in no way limit our ability to review the issue on final judgment.")

Moreover, although Respondents consider it highly unlikely based upon the facts of this case, it is at least *possible* that Patel may obtain vacation of the *Patel I* judgment on remand. Accordingly, any constitutional challenge would be mooted.

Accordingly, the state-court decision has not effectively determined the entire litigation and so is not final and subject to review by this Court.

II. THE DECISION OF THE OKLAHOMA SUPREME COURT CONSTRUING AND APPLYING OKLAHOMA LAW DOES NOT CONFLICT WITH ANY "APPLICABLE" FEDERAL LAW OR THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

In her Petition, Patel urges this Court to grant certiorari in this case because "the Oklahoma Supreme Court has decided a substantial federal question in a way clearly in conflict with applicable decisions of this Court", Pet. 25, and in violation of her constitutional right to procedural due process. Patel's attempt to re-cast the Oklahoma court's ruling interpreting the requirements of an Oklahoma statute in a federal light is deceptive and unavailing.

A. *Hazel-Atlas* and Its Progeny Do Not Establish a Due Process Right to Vacation of Judgment Where an Attorney Allegedly Participates in a Fraud on the Court.

In support of her proposition that the Oklahoma Supreme Court's decision conflicts with federal constitutional law, Patel relies heavily upon *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), which neither mentions the Due Process Clause nor purports to apply to any court outside of the federal system. In *Hazel-Atlas*, this Court recognized an exception to the general rule adhered to by *federal* courts at that time that precluded those courts from altering or setting aside their judgments after the expiration of

the term in which the judgments were entered. *Id.* at 244-50. The Court concluded that a federal appellate court had authority to set aside a judgment that it had previously ordered to be entered in a patent infringement case where subsequent evidence established that the patent and the judgment had been procured by fraud. *Id.* The Court thus held that a federal court may entertain a suit to set aside or amend a fraudulently-obtained judgment after the expiration of the term in which the judgment was entered.

Patel attempts to stretch this straight-forward holding of *Hazel-Atlas* much farther, claiming in a parenthetical reference that *Hazel-Atlas,* in fact, held that the "involvement of [an] attorney in [a] plan to fabricate false evidence becomes fraud on the court, *inherently voidable* without regard to statutes of limitations, [the] defrauded party's diligence in uncovering the fraud and without regard to the materiality of the fraud." Pet. 14 (in the final paragraph on the page). Patel misrepresents the holding and the impact of *Hazel-Atlas*. First, the opinion does not even include the word "voidable," much less the phrase "inherently voidable" – which Patel attributes to *Hazel-Atlas* in at least four separate places in her Petition.[9] Pet. 12, 14, 15, 17. Further, the Court clearly considered the materiality of the fraud, noting that the patent holder's attorneys could not challenge the materiality or the effectiveness of the fraudulently procured article which was obtained in order to sway a hostile patent office and which they emphasized in the successful appeal (after failing to highlight it in their losing bid at the trial

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[9] Patel also attributes the phrase "inherently voidable" to the Ninth Circuit's opinion in *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128 (9th Cir. 1995). That case, too, contains no mention of this phrase. Indeed, Respondents' counsel found no reference to this phrase in any of the authorities cited by Patel. Thus, Respondents assume that the source of this alleged legal standard is Patel herself and submit that this "standard" – like much of Patel's argument – is completely unsupported by law.

court).[10] Although the Court recognized the attorneys' participation in the fraud on the patent office and the court, its decision was not – contrary to Patel's assertions – based *solely* upon the fact of the attorneys' involvement. *See* Pet. 16. Rather, the Court emphasized that the fraudulent activity at issue in *Hazel-Atlas* was a "deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals" and hence affected not just private parties but also involved "issues of great moment to the public." 322 U.S. at 245. Thus, the Court acknowledged that factors other than attorney involvement are to be considered.

Moreover, as noted above, the Court does not even purport to apply or to construe the Due Process Clause. In fact, there is no discussion at all of "due process" or, indeed, any constitutional issue. The other federal cases cited by Patel in support of this proposition are equally devoid of due process analysis on this issue. *See* Pet. 24-25 n.4 (citing cases). Thus, contrary to Patel's suggestions, *Hazel-Atlas* and its progeny merely establish and recognize a procedural rule for federal courts, allowing vacation of a fraudulently obtained judgment after expiration of the term in which it was entered. These cases do not recognize a *per se* federal constitutional right to a vacation of judgment any time there is alleged attorney involvement in fraud on the court.

Finally, Patel neglects to call to this Court's attention a case decided just two years after *Hazel-Atlas*, which supports the Oklahoma Supreme Court's decision to remand this case for

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[10] Referencing this portion of the opinion, Patel asserts, "There is a virtually irrebuttable presumption of the materiality of such fraud simply because the attorneys went to the trouble to effect it." Pet. 26. However, the opinion contains no mention of presumptions, irrebuttable or otherwise.

an evidentiary hearing prior to vacating the *Patel I* judgment on the basis of fraud. In *Universal Oil Products v. Root Refining Co.*, 328 U.S. 575 (1946), the Court cited *Hazel-Atlas* for the proposition that a federal court has the inherent power to investigate whether a judgment was obtained by fraud. *Id.* at 580. However, the Court concluded that "if the rights of parties are to be adjudicated in such an investigation, the usual safeguards of adversary proceedings must be observed. . . . *[A] court cannot deprive a successful party of his judgment without a proper hearing.*" *Id.* (emphasis added).

B. The Constitutional Law Cases Cited by Patel Merely Address the Protection of Established Constitutional Rights; They Do Not Create a Constitutional Right In This Case.

The second key ingredient in Patel's Petition is a group of constitutional law cases which Patel offers in support of her claim that the Oklahoma court's failure to affirm the vacation of the judgment in *Patel I* constitutes a violation of procedural due process. However, these cases are simply inapposite to this case.

First, Patel relies on *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988). Pet. 18-20. In *Peralta*, a default judgment was entered against Peralta in a collection suit brought by a hospital. The judgment was recorded, a writ of attachment issued, and Peralta's real property was sold at a constable's auction in order to satisfy the judgment. Two years later, Peralta initiated a bill of review procedure in the Texas state courts to set aside the default judgment and void the sale on the grounds that the original service of process was untimely and that he had never been personally served. Applying a Texas procedural rule, the trial court entered summary judgment in favor of the hospital because Peralta was unable to demonstrate

that he had a meritorious defense to the action in which the judgment was entered. The Texas Court of Appeals affirmed, and this Court granted certiorari.

The unanimous Court noted the well-established constitutional principle that "'[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections.'" 485 U.S. at 84 (*quoting Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The Court recognized the validity of Peralta's argument that, if he had received notice of the suit, he would have had more attractive alternative remedies available to him (*e.g.*, working out a settlement, paying the debt, selling the property himself) even if he could not have presented a meritorious defense. *Id.* at 85. The Court concluded:

> Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, "it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." . . . [O]nly "wip[ing] the slate clean . . . would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place." The Due Process Clause demands no less in this case.

485 U.S. at 86-87 (citations omitted).

Patel appears to cite *Peralta* for the proposition that once a "constitutional infirmity" is proven, the judgment should be reversed notwithstanding the state's interest in the finality of

judgments or the enforcement of procedural rules. *See* Pet. 19. Even under such a strained construction of *Peralta*, Patel still must be able to establish a constitutional violation. *Peralta* presents a textbook case of deprivation of property (*i.e.*, Peralta's real property) without due process (*i.e.*, notice and opportunity to be heard). As discussed below, Patel has articulated neither a deprivation of property nor a lack of sufficient process. Therefore, Oklahoma's interest in the finality of its judgments and the enforcement of its procedural rules may not be trumped in this case.

Patel also relies upon two cases relating to prosecutorial misconduct. Pet. 20-22. In *Chapman v. California,* 386 U.S. 18 (1967), the Court reversed the convictions of the petitioners, who were convicted in California state court of robbery, kidnaping and murder. During the trial, the prosecutor repeatedly commented on the criminal defendants' failure to testify, and the trial judge instructed the jury that it could draw adverse inferences from the defendants' silence. Subsequent to the trial but prior to the state appeal, this Court held such practices to be invalid on the ground that they penalized a criminal defendant for exercising his Fifth Amendment rights. *See Griffin v. California*, 380 U.S. 609 (1965). Applying *Griffin*, the California Supreme Court recognized that the *Chapman* defendants had been denied their constitutional rights, but the court concluded that the error was harmless under the California Constitution, which forbids reversal unless "'the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.'" 386 U.S. at 20 (*quoting* Cal. Const. Art. VI, § 4 ½)). This Court granted the defendant's petition for certiorari.

The defendants argued in this Court that the denial of a federal constitutional right should automatically result in reversal of a conviction, without regard to whether the error is

considered harmless. *Id.* The Court specifically declined to adopt such a rule, noting that "[a]ll of these [harmless error] rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little likelihood of having changed the result at trial." *Id.* at 22. However, the Court concluded that "before a *constitutional* error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24 (emphasis added). The Court placed the burden of proving the harmlessness of the error on the beneficiary of the error. *Id.*

Patel cites *Chapman* for the proposition that "it is the misbehaving – i.e., the *defrauding* – party who bears the burden of proving the *immateriality* to the outcome of his fraud in order to *avoid vacation* of the judgment." Pet. 20. This interpretation misrepresents the holding of *Chapman*. *Chapman* addresses the impact of constitutional errors on criminal convictions. It does not even remotely extend to the issue of the materiality of an alleged fraud on a civil judgment. Moreover, *Chapman* does not *create* a constitutional right in itself. It merely dictates the proper procedure for review when an established constitutional right is violated – which has not occurred here. Finally, contrary to Patel's position that vacation of the judgment in *Patel I* should be automatic upon the trial court's finding of fraud (in spite of the fact that the trial court made this "finding" without affording Respondents an evidentiary hearing in violation of their due process rights), *Chapman* expressly recognizes that the *impact* of an error – even a constitutional error – should be examined prior to reversing a judgment on that basis.[11] This is consistent with the standard articulated by

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[11] It should be noted that *Chapman* arose in the context of a direct criminal appeal and not the habeas corpus context. Thus, the finality of a civil judgment was not a factor in that case.

the Oklahoma Supreme Court that requires Patel to "demonstrate that there is a substantial likelihood that a new trial will have a different result" on remand. Pet. App. 32a.

Patel also contends that *Chapman* and *Brown v. Borg*, 951 F.2d 1011 (9th Cir. 1991), a federal habeas corpus case applying *Chapman*, "*mandate* the complete vacation of [judgments obtained with attorney-complicit fraud], once such attorney-complicit fraud *alone* is shown, as here, *without any further showing whatsoever* by the moving party, although the defrauding party can *prevent* judgment vacation if it is able to prove the utter *immateriality* of its fraud." Pet. 22. However, as discussed above, these cases do not even remotely address such an issue – much less set forth a "mandate" thereon. Patel has simply fabricated this argument out of whole cloth. Her argument on this issue finds no support in these or any cases and should be rejected summarily.

Accordingly, the constitutional law cases cited by Patel do not establish the existence of a federal constitutional violation in the instant case.

C. Patel Does Not Otherwise Attempt to Establish That the Oklahoma Supreme Court's Decision Implicates the Due Process Clause.

Aside from her attempt to combine two unrelated lines of cases to create a constitutional right to vacation of the judgment in *Patel I*, Patel does not articulate the applicable due process standards or indicate how the instant case violates those standards. The likely explanation for this serious omission is that such a claim cannot be made.

In order to establish a violation of the Due Process Clause, a party must prove that he was deprived of "life, liberty or property" without due process of law. This Court has recognized that the threshold determination which must be made in any due process claim is whether a liberty or property interest, within the meaning of the Due Process Clause, is at stake. *Perry v. Sinderman*, 408 U.S. 593 (1972). It is equally well-established that such interests are not created by the Constitution, but rather are derived from an independent source sufficient to create a legitimate claim of entitlement, such as state law or statute. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *see also Logan v. Zimmerman*, 455 U.S. 422, 430 (1982) (noting that the Court has emphasized that the "hallmark of property" is "an individual entitlement grounded in state law, which cannot be removed except 'for cause'") (citation omitted)). Here, there is no state law or "source" which entitles Patel to vacation of a judgment merely upon an alleged showing of "attorney-complicit fraud."[12] Indeed, Patel has not even attempted to identify the "source" of such a right aside from the inapposite federal cases discussed above.

Even assuming that Patel has a recognized property right in the vacation of the judgment in *Patel I*, Patel has not established – and indeed cannot establish – that the decision of the Oklahoma Supreme Court has deprived her of that right without due process of law. The Oklahoma court held that in a proceeding to vacate a judgment pursuant to 12 Okla. Stat. § 1031, the party seeking to vacate the judgment must establish four requirements. Noting that the record before the court was

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[12] Although a cause of action may constitute a property right for purposes of procedural due process (*see Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982)), state law – and not the Due Process Clause itself – defines the cause of action and its parameters. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

silent as to those requirements, the Oklahoma Supreme Court remanded the case to the district court for further proceedings. Thus, Patel will receive a full and fair hearing as to those requirements on remand. That is all that the Due Process Clause requires.

III. THE OKLAHOMA SUPREME COURT'S DECISION PROTECTS THE ADMINISTRATION OF JUSTICE AND PRODUCED A JUST RESULT.

Patel claims that "[t]he effect of the Oklahoma Supreme Court's decision in both [*Patel II* and *Patel III*] could hardly be more corrosive to the administration of justice in Oklahoma." Pet. 29. In support of this warning, Patel urges the Court to believe that the decision of the Oklahoma Supreme Court will (1) eliminate the duty of attorneys to disclose any frauds of which they are aware; (2) preclude the imposition of sanctions or other remedies for fraud discovered after judgment has been entered, thus encouraging attorneys to wait until after judgment to disclose a fraud on the court; and (3) promote fraud and a "catch-me-if-you-can" mentality. Pet. 29. Patel's "parade of horribles" mischaracterizes the Oklahoma Supreme Court's decision and disregards time-honored ethical, criminal, and civil remedies that provide ample incentive for attorneys and parties to avoid any hint of fraudulent activity.

First, the Oklahoma Supreme Court did not hold – as Patel suggests – that a judgment may never be vacated pursuant to 12 Okla. Stat. § 1031, for fraud in which an attorney participated. Rather, the court merely recognized certain criteria which must be met by a party seeking to vacate a judgment on that ground. Indeed, Patel herself could still obtain a vacation of the judgment on remand if she sought hearing and proved the factors set forth in the *Patel II* opinion.

Further, the Oklahoma Supreme Court expressly notes in *Patel III* that a myriad of other sanctions against and remedies for fraud are available without requiring the creation of a new tort:

> If [Patel] is successful in vacating the *Patel I* judgment, discovery or other sanctions for the defendants' litigation-related misconduct in the original case may, if warranted, be imposed in the reopened case. Apart from the remedies available within the existing case, a party aggrieved by litigation-related misconduct may seek to invoke sanctions available under the criminal law and, in the case of attorney misconduct, by bar disciplinary measures.

Pet. App. 40a. The court thus makes it clear that its decision does not create an open-season for litigation-related fraud or other misconduct, regardless of when it was discovered.

Finally, the decision of the Oklahoma Supreme Court ultimately produced a just result because it was necessary to protect Respondents' due process rights. In the instant case, the district court vacated the judgment in *Patel I* without holding an evidentiary hearing or allowing Respondents to offer evidence on disputed fact issues, including the crucial issue of whether a fraud occurred. The Oklahoma Supreme Court concluded that the district court's failure to entertain evidence prior to vacation violated Respondents' due process rights:

> [W]here the dispositive issues in a vacation quest call upon the trial court to resolve one or more fact controversies, an opportunity to adduce proof must be provided. The Constitution inexorably commands that no one's rights are to be adversely affected by judicial process that takes place in the absence of notice

> and a full and fair opportunity to be heard. In the vacation proceeding under review today, the court is called upon the determine fact issues relating to fraud as well as fact issues relating to the prudential restrictions on vacating judgments which are set forth in today's opinion. On these disputed fact issues, the parties must be afforded an opportunity to present evidence.

Pet. App. 35a. Therefore, the court's decision to remand this case actually remedied a due process violation and afforded Patel an equal opportunity to adduce proof of the alleged fraud and other evidence required by the supreme court's ruling.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondents

Dated: January 27, 2000

IN THE DISTRICT COURT IN AND FOR
TULSA COUNTY
STATE OF OKLAHOMA
Filed: October 1, 1996

Case No. CJ 93-05291

URVASHI B. PATEL,
Plaintiff,

vs.

OMH MEDICAL CENTER, INC., an Oklahoma corporation, ST. FRANCIS HOSPITAL, INC. an Oklahoma corporation, and JOHN B. STEVENS, an individual,
Defendant.

PETITION TO VACATE PORTION OF JUDGMENT PURSUANT TO 12 O.S. §1031 FOURTH

COMES NOW the Plaintiff, Urvashi B. Patel (the "Plaintiff") and files this Petition to vacate the portion of the Judgment in this case filed March 22, 1995, which dismissed her claims for prima facie or indeterminent tort and intentional infliction of severe emotional distress against the Defendants and alleges and states as follows:

1. The Plaintiff is a resident of Tulsa County, State of Oklahoma.

2. The Defendant, OMH Medical Center, Inc. ("OHM"), is an Oklahoma corporation, whose principal place of business is either in Tulsa County or in Okmulgee County, State of Oklahoma.

3. The Defendant, St. Francis Hospital, Inc. ("St. Francis"), is an Oklahoma corporation, whose principal place of business is in Tulsa County, State of Oklahoma.

4. The Defendant, John B. Stevens ("JBS"), is an individual whose place of residence is presently unknown.

6. This case began by Petition filed on November 29, 1993, and was an action to collect amounts contractually due Plaintiff from Defendant OMH and an action in tort arising out of actions taken by the Defendants, acting in concert, toward the Plaintiff during 1993, in which they attempted, for their financial benefit, to blackmail her by threatening to cause irreparable damage to her professional reputation as an anesthesiologist by threatening either to withhold any favorable recommendations concerning her performance as a physician at OMH, or otherwise to slander her, unless she waived her right to all or part of a $50,000 fee to which they knew she was contractually entitled, which actions have resulted in substantial emotional and financial injury to Plaintiff. Plaintiff prevailed on her contract claims against Defendant OMH at trial and Defendant prevailed on Plaintiff's tort claims.

7. This is a proceeding, pursuant to 12 O.S. §1031 Fourth, to vacate that portion of the Judgment in this case filed on March 22, 1995, which dismissed Plaintiff's tort claims against all Defendants, by reason, on information and belief, that Defendants obtained that portion of such Judgment, a copy of which is attached hereto as Exhibit "A", through fraud, practiced against Plaintiff and on the Court, through their agent, Larry D. Henry and his law firm, Arrington, Khile, Gabberino and Dunn, as described hereinafter.

8. Venue and jurisdiction are proper within the district of Tulsa County, State of Oklahoma.

9. The allegations in Plaintiff's pleadings in this case immediately prior to its trial were as follows:

a. For a number of years prior to March 12, 1986, Okmulgee Memorial Hospital Authority had operated the Okmulgee Memorial Hospital in Okmulgee, Oklahoma.

b. On March 12, 1986, Defendant OMH was incorporated under the laws of Oklahoma to acquire by lease from Okmulgee Memorial Hospital Authority all the assets, properties and facilities then used in the operations of Okmulgee Memorial Hospital and for various other related purposes.

c. On March 12, 1986, the registered office for Defendant OMH was located at the same address as Defendant St. Francis in Tulsa, Oklahoma and, on information and belief, it has been the intention of Defendants OMH, St. Francis and Okmulgee Memorial Hospital Authority at all times since then that OMH be operated under the tutelage or affiliation of Defendant St. Francis. At the present time and for several years previously, Defendant St. Francis has had a contract with Defendant OMH pursuant to which it was to furnish all managerial personnel to OMH, as loaned-out employees, including OMH's administrator, assistant administrator (if any) and chief financial officer. Also, pursuant to the same or similar contracts, Defendant St. Francis has been obligated to furnish OMH other substantial services, and has been committed to extend loans without limitation to fund operating deficits which OMH was to incur and has in fact incurred.

d. Throughout 1993, and continuing to the present time, Defendant OMH has been completely under the management and control of Defendant St. Francis, and has

effectively been operated as a branch of Defendant St. Francis, by virtue of at least the following facts:

(1) Defendant St. Francis has supplied OMH with all management and control personnel, including officers and a substantial portion, if not a majority, of OMH's board of directors on a regular basis, all of whom have reported to employees of Defendant St. Francis;

(2) Defendant St. Francis has provided essential financial resources to fund OMH's ongoing operating deficits by providing OMH, on demand, with "loans" secured by OMH's assets which, on information and belief, were not commercially reasonable loans and which, if enforced in a commercially reasonable manner, would result in St. Francis foreclosing on all OMH's facilities; and

(3) By providing other services essential to OMH's functioning.

e. Notwithstanding the fact that for many years general surgery had been performed at OMH and its predecessor hospital, prior to 1992, such surgery had been performed without the services of an anesthesiologist. Instead, the hospital and its staff had relied exclusively on one or more nurse anesthetists to administer all anesthesia in connection with surgery performed there which nurse anesthetists were supervised only by surgeons who lacked any specialized knowledge of anesthesiology.

f. During 1992, on information and belief, as a result of pressure from its own board of directors and the

board of directors of Defendant St. Francis, Defendant OMH decided to contract for the services of an anesthesiologist to supervise the anesthesia function being performed therein.

g. In June, 1992, OMH successfully entered into a "Physician Incentive Agreement" (the "Contract") with Plaintiff to engage her services as an anesthesiologist and as the director of anesthesia at Defendant OMH's hospital facility. The Contract has been negotiated over a period of a number of months and called for Plaintiff to begin her period of working at Defendant's hospital on August 30, 1992. That Contract was to last for a period of three (3) years, subject to the right of either party to terminate it pursuant to the following provision in Section 5.2.4 of the Contract:

> Either party may *terminate* this Agreement without reason or cause *after* Practitioner has relocated to the community by giving the other party 120 days *advance* written notice *and* by paying a termination fee of $50,000.00 to the other. If the termination occurs after two and one-half (2 1/2) years, there shall be no termination fee for either party. During the 120 day period, each party shall continue to perform her or it's duties and obligations under this Agreement.

h. Under the Contract, throughout its term, Defendant OMH has been obligated to pay Plaintiff $17,500.00 per month on the last day of each month in advance for the next succeeding month, in addition to other cash obligations to Plaintiff thereunder.

i. At the time of negotiating the Contract, Plaintiff advised one Jerry Johnson, who was then the

Administrator for Defendant OMH, and who at all times referred to herein has also been employed by Defendant St. Francis, that it was apparent that the level of business that could come her way at OMH would not be sufficient to make her presence there profitable for the hospital and, indeed, that Defendant OMH was virtually guaranteed to lose a substantial amount of money each month if she were to be paid her guaranteed salary there. Jerry Johnson acknowledged to the Plaintiff that both he and the board of directors of Defendants OMH and St. Francis were aware of this situation but that for purposes of protecting their own liability and to facilitate the hiring of additional specialized surgeons they deemed it necessary to have a person with her skills available and so were willing to lose money during the Contract period just to obtain her presence and services at OMH's hospital.

j. In late 1992, Jerry Johnson ceased to be the Administrator of Defendant OMH and was replaced in that capacity by Defendant JBS. JBS was hired as acting Administrator by OMH and St. Francis primarily to reduce what were at that time substantial net operating losses which it was incurring each month which losses were being funded by Defendant St. Francis.

k. Defendant JBS had represented himself to Defendants as, and had been employed as, a so-called "turnaround specialist", prior to becoming acting Administrator of Defendant OMH. He interviewed with both Defendant OMH and Defendant St. Francis before being hired and was approved by both.

l. Since early 1993, Defendant JBS has acted as Defendant OMH's administrator and, since August, 1993, has been an employee, in that capacity, of Defendant St. Francis who pays his salary. He has reported all his

activities at OMH on a monthly basis to St. Francis personnel as well as to the OMH board of directors.

m. During July or August, 1993, the Defendants determined that they wished to end the expense of paying the Plaintiff under the Contract and attempted to have her gratuitously waive her rights under that Contract, which she refused to do.

n. On several occasions in October, 1993, the Defendants advised the Plaintiff that they were in a position to prevent her from ever receiving any but derogatory letters of recommendation concerning her performance at Defendant OMH's hospital and that they would permit her to receive favorable recommendations only if she agreed to waive all or part of her contractual right to be paid $50,000 by OMH upon terminating her services there. This the Plaintiff refused to do.

o. On October 27, 1993, the Plaintiff specifically demanded that the Defendants furnish her with copies of all letters of recommendation previously prepared on her behalf, and specifically refused therein to waive any of her rights, including the right to the $50,000 termination payment, under the Contract, to which letters Defendants knew Plaintiff was entitled; Defendants refused and failed to deliver such letters thereby converting such letters to their own use and depriving the Plaintiff of such to her detriment.

p. By letters dated October 22, 1993 and October 25, 1993, the Defendants purported to terminate the Contract under § 5.2.4 thereof, quoted above at paragraph 14, by delivering to the Plaintiff a letter notifying her of termination. However, in direct contravention of that same clause, the Defendants failed to deliver to Plaintiff $50,000.00 as the advance termination fee also called for

thereunder. Such $50,000.00 advance termination fee has never been paid to Plaintiff to date and, accordingly, the Contract remains in effect.

q. By letter dated March 10, 1994, Defendant OMH advised the Plaintiff of the following:

> You are hereby notified that you may absent yourself from OMH permanently and that you should not perform any services on behalf of OMH Medical Center, Inc. or its patients, employees or physicians, without prejudice to any claims you may assert under the contract you had with OMH Medical Center, Inc. Specifically, OMH Medical Center, Inc. explicitly waives any requirement for you to perform any services or to be present at its facility after February 22, 1994.

r. On January 5 and January 6, 1994, the Plaintiff took the deposition of Defendant JBS. During the course of such deposition, JBS, on his own behalf and on the behalf of all other Defendants, repeatedly made willful and deliberate misrepresentations of material facts, while under oath, in a deliberate effort to prevent the Plaintiff from learning such material facts relating to this case and to further harm her interests thereby.

s. Defendant OMH has ceased paying Plaintiff the $17,500.00 due in advance of each month under the Contract, commencing February 22, although Plaintiff has demanded that it make such payment and, accordingly, it is presently in arrears of $35,000.00 for the payments due on February 28, and March 31, 1994.

FIRST CAUSE OF ACTION–PRIMA FACIE TORT

t. Plaintiff adopts and realleges all the preceding allegations and further pleads as follows:

u. Defendants, fully cognizant of Plaintiff's rights under the Contract and knowing that her career as an anesthesiologist would effectively be destroyed if they refused to provide third parties with anything other than unfavorable recommendations on her behalf, and knowing that blackmail is a criminal offense, acting in concert committed such blackmail by so threatening the Plaintiff and thereby causing her great mental and financial injury and causing irreparable harm to her medical practice resulting in the loss of future profits therein in excess of $10,000.

v. On January 5, and January 6, 1994, when Plaintiff took the deposition of JBS, on his own behalf, and on behalf of the other Defendants, he deliberately and repeatedly lied about numerous facts material to this litigation in an effort to stymie the Plaintiff's case against all such Defendants and thereby further injured her by further inflicting additional emotional and financial injury to her in excess of $10,000.

SECOND CAUSE OF ACTION–INTENTIONAL INFLICTION OF SEVERE EMOTIONAL DISTRESS OR OUTRAGE

w. Plaintiff adopts and realleges all of the preceding allegations and further pleads as follows:

x. Defendants' attempt to hold Plaintiff's entire career hostage to their financial demands on her was made with full knowledge of the importance to her of her career as an anesthesiologist, the continuing importance to such career of her maintaining satisfactory reports concerning

her performance at OMH, knowledge that her performance at OMH was, consistent with her performance at all prior hospitals, professionally exemplary, and such behavior of Defendants was outrageous and intentionally caused Plaintiff great physical and mental distress.

10. At the trial of this case, the Court permitted Defendants to introduce their Exhibit 1 (attached hereto as Exhibit "B") based on the Court's reliance upon *very explicit* representations about that document, and about the file in which it was located, by Defendants through their counsel, Larry Henry. The Court initially stated that Defendants' Exhibit 1 could not be admitted for *any* purpose and agreed to do so *solely* because of such explicit representations concerning it by Mr. Henry.

Defendants' Exhibit 1 Had A Material, Adverse Effect On Plaintiff's Case.

11. Mr. Henry advised the Court that the sole basis for admitting Defendants' Exhibit 1 was "this is just showing the fact that there was something in her file that was negative and she was hired." However, if, as Plaintiff was explicitly advised by OMH personnel, and as Plaintiff's trial attorney advised the Court at Trial, OMH personnel (1) *actively investigated* the allegations in Defendants' Exhibit 1, (2) received documentary evidence explicitly refuting its allegations and (3) attached such refuting items to that document, so that a single document *nullifying* any such allegations was thereby created *prior* to its view by any peer review groups at OMH, Defendants' Exhibit 1 would not have had *any* probative value whatsoever, even for the (claimed) limited proposition for which Defendants sought to admit it.

12. Defendants' Exhibit 1 was received by OMH in connection with Plaintiff's *privileges* application which actually *followed* her hiring by OMH: her Contract with OMH

was executed by OMH on June 16, 1992, and Defendants' Exhibit 1 was not received by OMH until after July 2, 1992, almost one month *after* the execution of the Contract. Accordingly, the totality of Defendants' Exhibit 1 *plus* any OMH-generated repudiating documents would have left the *completely different* (and correct) impression on the jury's mind: to-wit, that only because Plaintiff *had already been hired* at the time it received Defendants' Exhibit 1, OMH took extraordinary efforts to *review the veracity* of its contents and, on finding them to be false through documentary evidence, prepared her file accordingly. Inasmuch as Jerry Johnson, OMH's administrator when Plaintiff was hired, testified at trial that, had Plaintiff had any negative references she would not have been hired at all, the presence of such a *refuting* document in the file, whether or not attached to Defendants' Exhibit 1, would have been particularly probative of *Plaintiff's* position, not Defendants'. Defendants through Mr. Henry, explicitly represented to the Court at the trial that no such refuting documents exist.

13. Defendants' Exhibit 1 contained extremely damaging accusations about Plaintiff, which were wholly untrue, as Defendants were well aware, including the accusation that her privileges had actually been *revoked for cause* at the hospital where she was working immediately before joining Defendant OMH's staff. The damage inflicted on Plaintiff at trial by Defendants' Exhibit 1 was further exacerbated by Plaintiff being put in the position of having nakedly to deny its allegations without the opportunity to show any contrary documents or other evidence when cross-examined about it by Defendants' counsel.

14. Plaintiff provided her case at trial inasmuch as Defendants admitted all its central allegations (Defendants' attempted extortion) in this case on the witness stand, as follows:

Q. (By Mr. Ribner) I am asking was your -- were you conveying to her in that conversation of October 2, the concept that her references would be the same regardless whether she waived the fee?

A: (By Defendant JBS) No, that was not the concept.

Q: So the concept was that her references would be different if she waived the fee?

A: Yes.

Q: You admit that?

A: Yes. Yes. Yes. Uh huh. Yes they would be.

Q: Now that was not what you said at your deposition was it?

A: I don't know. (Transcript of Record by Brenda Piles 5.2.3 II. 5-17).

15. Defendants' Exhibit 1 was the *only* adverse document which Defendants were able to produce at trial, and inasmuch as it necessarily left (groundless) questions hanging in the jury's mind concerning the Plaintiff, its admittance was almost certainly outcome-determinative. Had the Court *refused* to permit such document into evidence and had it nevertheless been shown to the jury, such would clearly have constituted a basis for a mistrial because of its highly prejudicial nature.

Defendants, Through Mr. Henry, Actively Refused To Permit Plaintiff Access To The File Of Which Defendants' Exhibit 1 Was Allegedly A Part.

16. Plaintiff's trial attorney described facts surrounding Defendants' Exhibit 1 to the Court at trial of which Plaintiff had advised him, which information she had received from both OMH's former hospital administrator and another person employed at OMH. That information was to the effect that false

allegations in Defendants' Exhibit 1 were specifically and explicitly refuted by at least one other document in OMH's file, which other document or documents had actually been attached in some manner to Defendants' Exhibit 1 by OMH personnel (who may themselves have prepared one of such refuting documents) before any peer review group at OMH passed on Plaintiff's privileges, so that that other document actually became a *part* of the original of Defendants' Exhibit 1 (Defendants only produced a *copy* of an alleged original of their Exhibit 1 at trial).

17. Defendants, through Mr. Henry, clearly and explicitly denied to the Court *both* that any such refuting document existed or that any document had ever been attached in any manner to the original of Defendants' Exhibit 1. It was only after Mr. Henry stated "there is nothing in the file of that nature [such as was described by Plaintiff's attorney and the Court]" that the Court indicated any willingness to permit the admittance of Defendants' Exhibit 1 under any circumstance.

18. Mr. Henry refused to bring to trial OMH's entire file regarding Plaintiff in which that document was allegedly a part, notwithstanding Plaintiff's attorney's explicit request to him to do so.

19. Because Mr. Henry refused to bring the file with him, Plaintiff and the Court were unable to test the truth and veracity of such representations on his part and it is clear from the record that the Court relied *exclusively* on her faith in Mr. Henry's truth and veracity, as an officer of the Court, of his representations, on behalf of Defendants, in permitting the admittance of that document.

If Any Of Mr. Henry's Representations Regarding Defendants' Exhibit 1 Were False, The Judgment On Plaintiff's Tort Claims Is Voidable Pursuant To 12 O.S. §1031.

20. Because the admittance of Defendants' Exhibit 1 was outcome-determinative on Plaintiff's tort claims and because such admittance was procured by Defendants solely based on Mr. Henry's explicit representations to the Court concerning that document and the file, if *any* such representations were false, such would constitute a fraud on the tribunal sufficient to set aside the Judgment pursuant to 12 O.S. §1031 Fourth inasmuch as the Court would clearly not have admitted that document absent such explicit representations by Mr. Henry. On information and belief, all such representations by Defendants, through Mr. Henry, to the Court at trial concerning Defendants' Exhibit 1 were false and fraudulent and such misrepresentations were justifiably relied on by the Court in her ruling permitting the admittance of Defendants' Exhibit 1 which, in turn, resulted in the Court becoming an instrument of injustice which resulted in the jury finding for Defendants on Plaintiff's tort claims.

21. Plaintiff has good reason to doubt the veracity of Defendants' representations through Mr. Henry, described above, including the following:

a. The explicit, oral representations to Plaintiff concerning other documents in her file and their attachment to Defendants' Exhibit 1, by Jerry Johnson, OMH's former administrator and at least one other OMH employee;

b. The typical reaction of a hospital upon receiving a statement from an already-contracted, prospective staff member's immediate, prior hospital that her privileges had been *terminated for cause,* as Defendants' Exhibit 1

alleges, would be to follow up on such allegation and specifically determine its truth or veracity prior to submitting her file to peer review because of the seriousness of such allegation; and

c. Plaintiff was explicitly advised by at least one physician who prepared a document explicitly refuting the allegations in Defendants' Exhibit 1 that he would do so and forward it to OMH in connection with her privileges application.

WHEREFORE the portion of the Judgment dated March 22, 1995, dismissing Plaintiff's claims for prima facie or indeterminent tort and intentional infliction of severe emotional distress against Defendants should be vacated and set aside and this Court should grant Plaintiff such other relief as justice requires.

Respectfully submitted,

/s/ Clifford N. Ribner
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